In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No.

SOUTHERN PACIFIC COMPANY
(a corporation),
Petitioner,

vs.

GLADYS VIOLA HAIGHT,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY MATTER.

The petition makes reference to the judgment below, states the jurisdictional grounds and states the facts, which statements are adopted.

SPECIFICATION OF ERRORS.

We believe that the Court erred as follows:

(1) In failing to hold to and follow the law of the State of California that railroad companies, in the

reasonable management of their trains, which are rightfully upon a crossing, are not chargeable with knowledge that when inclement weather conditions prevail an automobile bearing sufficient headlights was nevertheless likely to crash into a moving train unless warning devices or a flagman with a lighted lantern was stationed in the highway, and that after the train reaches the crossing the duty of the flagman or other warning device ends as to that train;

(2) In holding that if the cross-arm sign maintained by a railroad company at a highway crossing would not be visible in a snowstorm not unusual in the vicinity, then it cannot rely upon the maintenance of the cross-arm as a full discharge of its duty to warn highway users of the presence of its railroad crossing and the dangers incident thereto, but must provide such other and further warnings as would be an effective warning under such circumstances;

(3) In holding that the railroad company was negligent in operating its trains over highway crossings in the open country and during snowstorms, fog or other inclement weather conditions, when it fails to give effective notice of the location of such crossing to travelers who knew and anticipated the existence and location of such crossing;

(4) In holding that the petitioner violated General Order 75-A of the Railroad Commission of the State of California in failing to locate a crossing sign in such a position that it would be conspicuous and visible during a heavy snowstorm, which limits vision to but 12 to 14 feet.

SUMMARY OF THE ARGUMENT.

(1) No duty under California law to maintain at country crossing any warning device other than the standard crossing sign (during in the existence of inclement weather) for the purpose of notifying travelers of the existence of such crossing and particularly where such travelers knew of the location of the railroad crossing, and appreciated that they were approaching such crossing.

(2) No violation of General Order 75-A of the Railroad Commission of the State of California.

ARGUMENT.

(1) NO DUTY UNDER CALIFORNIA LAW TO MAINTAIN AT COUNTRY CROSSING ANY WARNING DEVICE OTHER THAN THE STANDARD CROSSING SIGN (DURING THE EXISTENCE OF INCLEMENT WEATHER) FOR THE PURPOSE OF NOTIFYING TRAVELERS OF THE EXISTENCE OF SUCH CROSSING, AND PARTICULARLY WHERE SUCH TRAVELERS KNEW OF THE LOCATION OF THE RAILROAD CROSSING, AND APPRECIATED THAT THEY WERE APPROACHING SUCH CROSSING.

The state of facts involved in the instant case is not one where the train runs into an automobile at a highway-railroad crossing, nor is it one where a train is occupying a crossing in violation of the statute or ordinance or for an unreasonable length of time, nor is it one where the view of crossing signs was obscured by building, other cars, brush or trees, but the state of facts involved is one where an automobile in which respondent was riding crashed into the side of a train while the latter was slowly moving over a highway

crossing, which accident occurred at a time when a snowstorm was prevailing, and when all of the occupants of the automobile knew and appreciated that they were approaching a railroad crossing. Under such circumstances, the Appellate Court of the State of California held in *Dunlap v. Pacific Electric Ry. Co.*, 12 Cal. App. (2d) 473 (55 Pac. (2d) 894), that there was no duty upon a railroad company to provide a flagman, red flares or some other means of warning to travelers that a train is being operated over the intersection, when inclement weather was prevailing, for the reason that railway companies, through their agents, in the reasonable management of their trains which are rightfully upon a crossing, are not chargeable with knowledge that an automobile, bearing headlights of sufficient power to enable the driver to avoid an obstruction in the road, was nevertheless likely to crash into a moving train unless a signal or a flagman with lighted lantern was stationed in the highway.

In the *Dunlap Case, supra,* an automobile, in which a guest was riding, ran into a moving train on a crossing when the fog was so thick at times that the occupants could barely see at all and at other times when they could see but 15 or 20 feet ahead. The majority opinion of the Circuit Court of Appeals recognized that if this case controlled it would be their duty to hold for the defendant in the instant case, but the Circuit Court of Appeals erroneously deemed the *Dunlap Case, supra,* as having been modified by a subsequent decision of an Appellate Court of California, and accordingly held that under California law if the defendant in the exercise of due care should have

known that the cross-arm sign maintained by it would not be visible in a snowstorm not unusual to the vicinity, then it cannot rely on the maintenance of the cross-arm as a full discharge of its duty to warn the highway user (a frequent user of the crossing) of the presence of its railroad crossing. The case referred to was *Harper v. Northwestern Pacific R. R. Co.,* 34 Cal. App. (2d) 451 (43 Pac. (2d) 821). In the last mentioned case the driver of an automobile—a stranger to the vicinity—was approaching (in a 45 mile per hour zone) an unknown spur track and collided with a standing train then blocking the crossing. The traveler had no warning of the presence of the spur track for the reason that the railroad company had permitted the crossing sign located in a conspicuous place to become so obscured by brush and trees that such sign could not be seen even on a sunshiny day. There was no inclement weather condition involved, as the accident occurred on a clear July night in California. The Court held that the defendant was negligent in permitting the crossing sign to become obscured by trees and other growths so it could not be seen by a traveler. Said Court also disposed of the contention that the presence of the cars across the highway constituted a sufficient notice of such crossing, irrespective of the obscured crossing sign, by stating:

> "For the presence of a car across a highway to constitute notice of such an obstruction, we must presuppose that its presence could have been known to or anticipated by a person of reasonable prudence. * * * It is only when one observes, or by the exercise of reasonable care should have observed, a railroad track, or *when one knows that*

> *it is in a particular place and identifies the locality, that it becomes a warning of danger.* * * * Here was not the situation *of a moving car upon a crossing,* or standing upon a lighted street, *or whether the existence of the spur was known to the decedent, but here where the presence of the spur itself was unknown to the driver of the car, a white cross-arm might have been seen where a dark box car would not."* (Italics ours.)

The doctrine announced in that case is that where the railroad crossing sign is placed in a position which would be in compliance with the order of the Railroad Commission, but was actually permitted by the railroad company to be so obscured by trees and brush that it could not be seen by approaching highway travelers, then the railroad company failed to perform the duty prescribed by General Order 75-A of the Railroad Commission.[10] Said case should really be treated as one in which no sign was present at all. The facts in the instant case distinguish the case from the *Harper Case, supra,* in this, the train was moving over the crossing, the existence and proximity of the crossing were known to the respondent and the driver, and although a white cross-arm might not have been seen through the snow, a dark box car would have been, and was seen.[11]

In the *Harper Case, supra,* the Court confirming existing California law that the railroad track of a

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[10]Said General Order is set forth in the Appendix.

[11]Respondent admitted that she saw the train within 13 feet or within the maximum length of her vision (R. 251) but did not see the cross-arm sign which was located but 4½ feet off the paved shoulder of the highway.

steam railroad must itself be regarded as a sign of danger by all travelers who knew or should in reason have known that they were approaching a railroad crossing. The track itself is a warning to all travelers except a stranger upon a highway over which, unknown to him, a railroad track crosses, which track is obscured and where there is nothing to indicate its presence or to warn him of its existence.[12] The *Harper Case,* which was premised upon the circumstances that the driver of the car, a stranger to the community, did not know he was approaching a railroad track and the track was obscured by darkness and no crossing sign was effectively maintained to warn him of its existence, was erroneously applied by the Circuit Court of Appeals to the instant case where the driver, respondent and the other occupant of the car had been over the crossing many times, knew of its existence and its location, and on approaching the crossing on the night of the accident appreciated that they were approaching such railroad crossing, and where a properly placed crossing sign was temporarily obscured by a snowstorm.

The holding of the Circuit Court of Appeals unwarrantly extends the doctrine of the *Harper Case* from cases where the crossing sign becomes obscure through the railroad company's negligence in permitting trees

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[12] *Koster v. Southern Pacific Co.*, 207 Cal. 753 (279 Pac. 788);
Gregoriev v. Northwestern Pacific R. R. Co., 95 Cal. App. 428 (273 Pac. 76);
Lawrence v. Southern Pacific Co., 189 Cal. 434 (208 Pac. 966);
Rosenbloom v. Southern Pacific Co., 59 Cal. App. 102 (210 Pac. 53).

and brush to hide the sign from the view of travelers, to a case where the sign is rendered obscure by inclement weather conditions. In other words, under the holding in the instant case the railroad company is now made responsible for an act of God (snowstorm), a matter beyond the railroad's control, for, as stated in *Driskell v. Powell,* 67 Fed. (2d) 484, at page 485:

> "For the fog itself, the defendant was not responsible."

The *Harper Case* does not involve the effect of inclement weather and the case of *Dunlap v. Pacific Electric Ry. Co., supra,* expressly declares that there is no duty to give additional warnings under similar weather conditions as prevailed in the instant case.

Reference is made to *Reines v. Chicago, M. St. P. & R. Co.* (Supreme Court, Washington), 80 Pac. (2d) 406, where the Court took pains to examine 75 cases on this subject and a review of that case will show that the holding of the Court below is not only contrary to the California law but to the law set forth in 58 cases of 27 different jurisdictions.

The Court in the *Harper case, supra,* expressly distinguishes the *Dunlap Case* from the *Harper Case,* because the cases are different on their facts. A holding that the *Harper Case* modifies the doctrine of the *Dunlap Case* is contrary to the express statement in the former case.

The view of Judge Haney in his dissenting opinion in the instant case that the *Harper Case* does not modify the decision in the *Dunlap Case* is supported

by the fact that the highest Court in California (Supreme Court) has, in effect, held that there is no conflict between the *Dunlap* and *Harper Cases*. We make this statement because the Supreme Court of California denied a petition seeking the transfer of the *Harper Case* to that Court and a hearing there, and it is reasonable to assume that the Supreme Court deemed that no conflict existed, as otherwise the Supreme Court could hardly have denied such petition and permitted the law on such an important question to remain in conflict and confusion. (Rule XXX, Sec. 6, Rules of the Supreme Court of California.)[13] Hence the decision in the instant case is probably in conflict with the state law as yet unannounced by the highest Court of that state. (*Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 206.)

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(2) NO VIOLATION OF GENERAL ORDER 75-A OF THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

The Railroad Commission of the State of California has exclusive power to determine and prescribe the manner, the terms of installation, operation, maintenance, use and protection of each crossing of a publicly used road or highway by a railroad. (Act 6386, General Laws of the State of California, Section 43(b), Statutes of California, 1933, page 2227.)[14] Pursuant to such authority the Railroad Commission issued General Order 75-A. Said General Order provided that one crossing sign be maintained at each crossing, and

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[13]Said rule is set forth in the Appendix.
[14]Above statute is set forth in Appendix.

be constructed and installed in accordance with specifications and be located in a conspicuous position facing highway travel. The provision does not require two signs, as said order provides for at least one sign to be located *"at either corner of the crossing intersection"*. All of the provisions of said order were complied with in the case at bar, as the signs were located in a conspicuous position which could be seen under all conditions for the full length of the traveler's vision, and the sign was facing highway travel. The trial Court erroneously instructed the jury:

> "If you find that the defendant company violated the above rule *at the time and place of this accident* in failing to locate its crossing sign in a conspicuous position facing highway travel and if you find that such violation if any was the proximate cause of the accident, I instruct you that the defendant company was guilty of negligence." (R. 489.)

Said instruction permitted the jury to determine whether or not the crossing sign was in a conspicuous place at the time of the accident, that is, during the existence of a snowstorm. The majority opinion of the Circuit Court of Appeals held such instruction was proper for the reason that the phrase "in a conspicuous position" means the sign must be visible under all weather conditions that can be anticipated. The Court by such construction has declared a duty to exist, which is impossible of performance. The Railroad Commission must have anticipated the presence of snow, fog and other types of prevailing inclement weather in California at the time said General Order

was adopted, and, further, must have appreciated that a wooden sign could not be seen when the traveler's view was limited by such conditions. Hence, the Commission's failure to require lights or other devices upon such crossing sign is decisive that said Order did not require the sign to be conspicuous and visible during fog or snowstorms. The word "conspicuous" (according to the Century Dictionary) means "open to view; catching the eye; easy to be seen". Things can be conspicuous, more conspicuous, or most conspicuous. Said General Order does not provide that said crossing sign must be placed in the most conspicuous place, nor does it leave room for any comparison whatever. It might be conspicuous if it were placed in any one of twenty different possible locations. To require a railroad company to place its signs in the most conspicuous place under the most adverse conditions that may prevail is placing an unwarranted and impossible construction on said General Order. California Courts have not constructed this or similar orders or statutes, but the same have been considered in other jurisdictions.

In *Baltimore & O. R. Co. v. Reeves,* 10 Fed. (2d) 329 (C.C.A. 6), the Court stated on page 732:

> "Nor does the lack of crossing sign bring damage, if the fog is too dense to see it, or if the traveler then knows the crossing is there."

In *Fields v. Chicago B. & Q. Ry. Co.,* 14 Fed. 332 at 335, the Court stated:

> "Thus a sign, if it existed, could give no warning to a blind man * * * nor if the sign were present it could not be seen (pitch darkness)."

The order did not provide that the sign must be seen under all circumstances for the further reason that the order requires but one sign at a crossing, and when a freight train is occupying a crossing, necessarily the sign is not visible to a traveler approaching from the side of the track opposite to the sign.[15] Further, the fact that the crossing sign was rendered invisible by the snowstorm or even the absence of the crossing sign, cannot be the proximate cause of the accident to a traveler like the respondent who knew of the presence and location of the crossing, for the crossing sign is installed solely to advise travelers of the presence of the crossing, and if the presence of the crossing is known to the traveler the silent sign cannot advise him of something he already knew.[16] Further, the track itself, under California law, is ample warning to all travelers who knew the presence and location of the crossing.

It is common knowledge that there are thousands of public and private crossings in California, and, further, that throughout California, as well as other states, weather conditions exist from time to time which reduce the visibility of an automobile driver to

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[15]In *Yardley v. Rutland R. Co.*, 153 Atl. 195 at 198, the Court held:

"The fact that the train hid the warning sign from Yardley's view is immaterial."

[16]Authorities on this question are reviewed in 93 A. L. R. 218. See particularly the following:

Gulf, etc. R. Co. v. Holifield, 120 So. 750;
Gallagher v. Montpelier & Wells River R. Co., 137 Atl. 207;
New York R. Co. v. Bowles, 171 N. E. 844, 846;
Missouri Pacific R. Co. v. Price, 33 S. W. (2d) 366;
Morley v. Cleveland, etc. R. Co., 194 N. E. 406;
Texas & N. O. R. Co. v. Stratton, 74 S. W. (2d) 464.

very short distances. Such conditions are to be expected on occasions, but they occur very rarely, and perhaps not more than two or three occasions at any particular crossing during a year's time. Naturally, such infrequent occasions do present conditions of unusual danger, but the Court in its opinion holds that it is the responsibility of the railroad company alone to guard against such dangerous conditions, and frees the automobile traveler from any corresponding duty. How then is it proposed that this new duty shall be fulfilled? No signal could be devised which would be a sufficient and effective warning under all circumstances, through snow, fog or smudge. Where would the railroad company procure sufficient flagmen to be stationed at each side of each crossing affected by such conditions in advance of each train operating thereover? How or in what manner could the petitioner have protected this crossing when the heavy snowstorm commenced but two minutes prior to this accident?[17]

Since the petitioner operates in seven states, the performance of this duty in California would so greatly impair the movement and operation of its trains as to render its interstate transportation ineffective, and this is particularly true during this period of emergency when the movement of war materials and men is so imperative.

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[17]In *Bowers v. Great Northern Railway Company*, 295 N. W. 99, and *Driskell v. Powell*, 67 Fed. (2d) 484, it was held that if not sufficient time has elapsed since the train stopped to the time of the accident for the crew to discover and guard against the extraordinary local condition complained of there was no breach of any duty.

CONCLUSION.

The Court below has misconstrued and misapplied the law of the State of California in a manner to create a new duty upon railroad companies, which would create such a hardship upon railroads generally, and which is so difficult, if not impossible, of performance, that the case is one calling for the exercise by this Court of its supervisory powers, in order that the proper construction of the law of California may be had, and that the conflict mentioned herein between the instant case and the cases of the Appellate Courts of California be removed, and that to such end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

Dated, Sacramento, California,
July 1, 1942.

Respectfully submitted,
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(Appendix Follows.)